

FEDERAL MAGISTRATES COURT OF AUSTRALIA

CHANDRA v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 1730

MIGRATION – Review of Migration Review Tribunal decision – refusal to grant an Extended Eligibility (Temporary) (class TK) visa – no reviewable error – application dismissed.

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.91X, 359A, 483A

Migration Regulations 1994 (Cth), reg.1.15A, div 1.5

Abebe v Commonwealth of Australia (1999) 162 CLR 510

Ebner v Official Trustee in Bankruptcy (2001) 205 CLR 337

Epeabaka v Minister for Immigration (1998) 150 ALR 397

Kopalapillai v Minister for Immigration (1998) 86 FCR 547

Livesey v New South Wales Bar Association (1983) 151 CLR 288

Minister for Immigration v Jia Legeng (2001) 205 CLR 507

Minister for Immigration v Wu Shan Liang (1996) CLR 259

NADH of 2001 v Minister for Immigration (2004) 214 ALR 264

Re Minister for Immigration; Ex parte Applicant S20/2002 [2003] HCA 30

Refugee Review Tribunal, Re; Ex parte H (2001) 75 ALJR 982

SAAP v Minister for Immigration [2005] HCA 24

SCAA v Minister for Immigration [2002] FCA 668

Tin Shwe v Minister for Immigration [2000] FCA 988

VFAB v Minister for Immigration (2003) 131 FCR 102

WABC of 2002 v Minister for Immigration [2002] FCAFC 286

Yit v Minister for Immigration [2000] FCA 885

Applicant: SOBHAGYA WATI CHANDRA

First Respondent: MINISTER FOR IMMIGRATION &
MULTICULTURAL AFFAIRS

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: SYG1220 of 2005

Judgment of: Lloyd-Jones FM

Hearing date: 23 October 2006

Delivered at: Sydney

Delivered on: 12 December 2006

REPRESENTATION

Advocate for the Applicant: The applicant appeared in person

Counsel for the Respondents: Ms R A Pepper

Solicitors for the Respondents: Australian Government Solicitor

ORDERS

- (1) The name of the first respondent be amended to read 'Minister for Immigration and Multicultural Affairs'.
- (2) The application filed on 12 May 2005 is dismissed.
- (3) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG1220 of 2005

SOBHAGYA WATHI CHANDRA
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The Proceedings

1. These proceedings were commenced by an application under s.39B of the *Judiciary Act 1903* (Cth) invoking s.483A of the *Migration Act 1958* (Cth) (“the Act”) filed in the Sydney Registry of the Federal Magistrates Court of Australia on 12 May 2005 for judicial review of a decision of the Migration Review Tribunal (“the Tribunal”). The Tribunal decision was made on 15 April 2005, affirming a decision of the delegate of the first respondent made on 29 March 2001, refusing to grant the applicant an Extended Eligibility (Temporary) (Class TK) visa or a (General (Residence) (Class AS) visa.

The applicant seeks relief in the form of constitutional writs against the decision of the Tribunal.

2. The applicant has not sought to join the Tribunal as a party, however given that it is an exercise of the Tribunal's jurisdiction that is under review, I will make the appropriate order that the Tribunal is joined as a party: *SAAP v Minister for Immigration* [2005] HCA 24 at [43], [91], [153] and [180].
3. In support of this application, the applicant tendered and applied for the following affidavits to be admitted into evidence:
 - a) Sobhagya Wati Chandra, affirmed on 27 September 2005 and filed in these proceedings on the same date;
 - b) Sobhagya Wati Chandra, affirmed on 16 October 2006 and filed in these proceedings on the same date, with which is attached and marked Exhibit "A", a transcript of the Tribunal hearing of 19 October 2004 with the assistance of a Hindi interpreter.
4. The respondents tendered and applied for the affidavit of Angela Margaret Nanson, sworn on 12 July 2005 ("affidavit of Ms Nanson"), to be admitted into evidence.
5. A Court Book ("CB") prepared by the respondents' solicitors was filed and served on 27 June 2005.

Background

6. The Tribunal decision of Bettina O'Neill, reference N01/02108, sets out in detail the background information under the heading 'Evidence'. (CB 99-108)
7. A convenient summary of that background is in the written submissions prepared by Ms Pepper, counsel for the respondents. I adopt paragraphs 2 to 6 of those submissions for the purpose of this judgment:
 2. *The applicant is a national of Fiji. She entered Australia from Fiji on a Subclass 578 (Short Stay) visa. This was extended until 30 August 1999. On 22 August 1999 the applicant married the nominator and on 25 August 1999 she lodged an*

application for a Subclass 820 (Spouse) visa with the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") under the Migration Act 1958 (0th) ("the Act") to remain permanently in Australia on the grounds of her martial relationship (CB 1-38). Her application was assessed under the visa and General Residence (Class AS) criteria.

3. *On 11 November 1999, the Department received a letter from the nominator stating that the relationship had broken down and advising a claim of domestic violence had been made against him (CB 40-41).*
4. *On 7 December 1999, interim protection orders were made against the nominator (CB 42-44). On 30 December 1999, the nominator formally withdrew his support from the application for residency.*
5. *On 15 May 2000, final protection orders were made against the nominator (CB 47-52) and on 8 August 2000, the Department notified the applicant of the nominators withdrawal of support (CB 45-46).*
6. *The application was subsequently refused on 29 March 2001 by the delegate on the basis that the material received was not sufficient to determine that a genuine and continuing relationship existed at the time the application was lodged (CB 55-71).*

Tribunal's Findings and Reasons

8. The application for review to the Tribunal was filed on 11 April 2001. The initial Tribunal hearing was held on 14 May 2002. The decision of that Tribunal was not handed down prior to the expiry of the term of appointment of that member. Therefore a further hearing was required, conducted by the Tribunal differently constituted, on 19 October 2004. (CB 81) After the hearing and on 21 October 2004, the Tribunal issued an invitation to comment on information under s.359A of the Act. (CB 84-87) The Tribunal invited the applicant to comment on information which it considered would be the reason, or part of the reasons, for affirming the Tribunal's decision under review. On 24 November 2004, Mr John Barratt of Visas Australia NZ wrote to the Tribunal indicating that the firm had been appointed as the applicant's agent. The agent attached the requisite Departmental form

with the applicant's authorization.(CB 89-90) He sought an extension of time to respond to the Tribunal's invitation to comment.(CB 88) The Tribunal granted an extension of time in a letter dated 29 November 2004.(CB 91) On 12 January 2005, Visas Australia NZ responded to the Tribunal providing answers to the questions raised in the Tribunal's letter of 21 October 2004.(CB 92) This is reproduced in the Tribunal's decision at CB 108.

9. The Tribunal assessed the application pursuant subclause 820.211(2) of the *Migration Regulations 1994* (Cth) ("the Regulations"). That is, it considered whether at the date of the (Class TK) visa application, the nominator and the applicant were in a general spousal relationship as required by the tests set out in reg.1.15A of the Regulations.(CB 109.1) The Tribunal concluded on the basis of this evidence put forward, that at the time of the application, it could not be satisfied that the nominator and applicant had a commitment to a shared life together as husband and wife to the exclusion of all others.(CB 113.1) Therefore, the applicant and nominator were not in a married relationship as defined by reg.1.15A(1A) of the Regulations.(CB 113.3) Accordingly, the Tribunal concluded that the applicant did not satisfy subclause 820.211(2) and affirmed the delegate's decision.(CB 113.4)

Application for Review of the Tribunal's Decision

10. On 12 May 2005, the applicant filed an application for review in this Court under s.39B of the Judiciary Act setting out 23 grounds of review.
11. On 27 September 2005, the applicant filed an amended application which contained the following grounds of review:

The grounds of the application are:

1. *The Tribunal's decision involved jurisdictional error of law in that the Tribunal refused to accept that the applicant and her nominator were in a genuine and continuing relationship within the meaning of the definition of the term 'spouse' as contained in Regulation 1.15A of the Migration Act 1958.*

Particulars

- i) *The Tribunal erred in not accepting the evidence of the applicant and in forming an opinion whether a married relationship existed because it failed to correctly take into account the considerations set out in sub regulation 1.15A(3) of the Migration Act 1958.*
 - ii) *The sub regulations set out in 1.15A(3) relate to all the circumstances of the relationship including, in particular, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the person's commitment to each other. While the applicant provided all the mandatory evidence the Tribunal failed to take these into account because of forming an opinion that was against the applicant.*
 - iii) *The fact that the Applicant had applied for and was successful in being granted an Apprehended Violence Order (AVO) against the nominator was sufficient proof that there existed a domestic relationship between the Applicant and her spouse.*
 - iv) *This crucial evidence was not considered by the Tribunal because the Tribunal was determined to find against the Applicant because of a pre-conceived notion that the Applicant lacked credibility.*
2. *The Tribunal correctly stated that the application lodged by the applicant was under Class TK, which contained the subclass 620 (Spouse). This meant that in order to satisfy this subclause the visa applicant had to establish that, among other criteria, she was, at the time of application the spouse of the nominator. However, in determining the existence of such a relationship, the Tribunal erred in not considering the following crucial evidence.*

Particulars

- i. *While the Tribunal was correct in stating that in forming an opinion whether a married relationship or de facto relationship existed, it had to take into account the considerations set out in subregulation 1.15A(3).*
- ii. *These considerations relate to all of the circumstances of the relationship including, in particular, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and nature of the*

persons. The Tribunal addressed these considerations under their respective headings which is discussed below; and despite being satisfied that the evidence before it was satisfied still proceeded to make an adverse decision against the Applicant.

iii) The qualifying elements for a married relationship:

The Tribunal acknowledged that the visa applicant and the nominator were married to each other in Merrylands, NSW on 22 August 1999. The Tribunal accepted that at the time of the application the visa applicant and the nominator were married to each other under a marriage that is recognised as valid for the purposes of the Act.

This point is important in that the Tribunal accepted the fact that the applicant and the nominator were married.

iv. The financial aspects of the relationship

- a) The Tribunal stated that the Applicant had stated at the hearing that she and the nominator had a joint bank account which was closed at the time of the hearing. The Applicant conceded at the hearing that she was not permitted access to any funds which were contained in that account.*
- b) The fact that the applicant was not permitted access to any funds which were contained in that account does not suggest anything sinister because the applicant was a person who did not have any income and therefore could not make any contributions to that account; and therefore did not per se operate that account.*
- c) The important thing was that the Applicant and her nominator had a joint bank account. This in itself was proof enough that the Applicant and the nominator were in a relationship. Why else would a man from Taree have an account with a woman in Sydney? In not accepting this fact the Tribunal denied the Applicant natural justice because crucial evidence was disregarded by the Tribunal.*
- d) The Tribunal erred in not recognising that the applicant and the nominator were two old people who did not on their own have separate incomes*

or any source of income apart from the nominator's pension.

- e) The Tribunal ought to have recognised that had it asked the right questions, it would have been satisfied with the explanation that would have been provided. This explanation was detailed in the initial application to the Federal Magistrates Court.*

3. The nature of the household

The Tribunal stated in its decision record that there was no independent documentary corroborative evidence of the visa applicant and the nominator living together at any address either in Sydney or Taree. The Tribunal again erred in not taking into consideration the following very relevant points:

Particulars

- i) The Tribunal has acknowledged that on the basis of the documentary evidence before the Tribunal, it appears that the incident of domestic violence may in fact have occurred on 7 November 1999 and was incorrectly recorded in the visa applicant's statement to the police as occurring on 7 August 1999. Having established that the alleged domestic violence took place on 7 November 2005; the Tribunal failed to take a very crucial piece of corroborative evidence into consideration; that being the fact that at the time of the alleged domestic violence the Tribunal recognised that the nominator left the house in Harris Park with police. This meant that the nominator was living with the applicant at the house in Harris Park; at the same address as where the applicant was staying.*
- ii) Under paragraph 19 of the decision record the Tribunal referred to the statutory declaration from the nominator dated 16 December 1999. In the statutory declaration the nominator makes mention of the following very important points that go towards proving that the applicant and the nominator had a shared life as husband and wife:*
 - a) On 22 August 1999 he got married to the applicant;*

- b) *He was residing with the applicant when on 7 November 1999 the visa applicant's daughter told the nominator to leave the home and called the police;*
- c) *The nominator stated that an Apprehended Violence summons was served upon him after he separated from the visa applicant.*

The Tribunal erroneously disregarded one very vital and important piece of information. That point being that by his very own admission and as presented as a sworn statement in the form a statutory declaration the nominator through his own volition stated that he lived with the applicant.

This then should have removed all doubts that the Tribunal had in so far as stating that there was no corroborative evidence of the visa applicant and the nominator living together. The fact that the police escorted the nominator from the Harris Park address was something that could have been independently verified and accepted as an independent corroborative documentary evidence.

- 4. *The Tribunal showed its bias by stating that on the basis of the evidence before it, it was not satisfied that the visa applicant and the nominator presented and were accepted as a married couple by family and friends at the time of application.*

Particulars

- i) *This was biased on the part of the Tribunal because as explained above, circumstances in the relationship kept this relationship a very private relationship.*
- ii) *The Tribunal should have concentrated on determining whether at the time of the application a married relationship existed between the Applicant and the nominator as set out in sub regulation 1.15A(3) of the Migration Act 1958.*
- iii) *By expressing Its personal views about the greater acceptability of the relationship by friends and family, the Tribunal was guilty of procedural unfairness and jurisdictional powers, because it went outside the parameters of its jurisdiction.*

5. *The Tribunal was wrong In not recognising that in reality the marriage was recognised by family and friends. By not accepting this crucial fact the Tribunal denied the Applicant natural justice because its decision making capability was clouded by bias preconceived conclusions.*

Particulars

- i) *The Tribunal ought to have recognised that the very fact the nominator's son allegedly threatened the applicant that he would kill her; would mean that the son was aware of the extent of the relationship and had decided not to accept his father's new relationship with the applicant. This would go towards proving that in the very least the nominator's sari accepted the applicant and the nominator as a married couple, hence the reason for his death threat.*
 - iii) *The transcript of the Tribunal's hearing will also show that the Applicant had stated that the nominator had met her brother and sister This would mean that the nominator was known to the Applicant's brother and sister.*
 - iv) *The transcript will also show that someone outside the family was a witness to the wedding. this was another example of the relationship being recognised by a member of the community.*
6. *The Tribunal showed gross disregard, contempt bias and committed jurisdictional error by stating it was concerned at how effectively the couple would have communicated with one another as the visa applicant had little English and the nominator was hearing impaired.*

Particulars

- i) *This was not the first example of a cross-cultural marriage. The Tribunal ought to have asked the applicant how they communicated. The Tribunal in expressing its personal opinion meant the Tribunal went beyond its Jurisdiction and expressed personal opinions.*
- ii) *Had the Tribunal pursued this question it would have realised that the applicant can manage to have a discussion using simple English? The fact that the applicant chose to have an interpreter at the hearing did*

not mean that she had no knowledge of the English language and was therefore incapable of communication with the nominator.

iii) The fact that the Tribunal stated the nominator was hearing impaired shows the Tribunal's insensitivity at the nominator's disability as well as bias towards the application.

7. The Tribunal displayed and was procedurally incorrect in disregarding crucial evidence supplied to it that would have further proved the relationship between the Applicant and her spouse the nominator;

Particulars

The Tribunal stated it was not satisfied on the basis of the evidence before it that there had been a mutual commitment to a shared life as husband and wife to the exclusion of all others by the visa applicant.

i) This was a crucial error on the part of the Tribunal despite the fact that the Tribunal noted that the nominator provided a letter to the Department dated 9 November 1999 in which he stated that the relationship broke down on 7 November 1999 and that he did not wish the marriage to break down.

ii) The admission by the nominator that he did not want the marriage to break down is significant proof that there was a genuine relationship between the Applicant and the nominator and that a married relationship existed between the Applicant and the nominator as set out in sub regulation 1.15A(3) of the Migration Act 1958.

8. The Tribunal displayed further bias and again overstepped its jurisdictional powers by stating its personal views that adversely affected the Applicant's hearing.

Particulars

i. The Tribunal stated that whilst the nominator's letter of 9 November 1999 lends some support to the suggestion that the nominator had a commitment to a shared life with the visa applicant as husband and wife, having regard to the totality of the evidence, on balance the tribunal found that the visa applicant did not have a

commitment to a shared life together to the exclusion of all others at the time of the application.

- ii. When the Tribunal accepted that the nominator's letter dated 9 November 1999 lent some support to the suggestion that there was a commitment to a shared life, the Tribunal referred to 'totality of the evidence' to conclude that the Applicant did not have a commitment to a shared life to the exclusion of all others at the time of the application.*
 - iii. The Tribunal again exceeded its jurisdiction because it had no right to cast aspirations or doubts about the Applicant's genuineness. By stating that it was not satisfied that the Applicant had a commitment to a shared life to the 'exclusion' of all others, meant that the Tribunal had concluded that the Applicant was involved in a relationship with someone else.*
 - iv. The Tribunal had no evidence to support this bias and in forming such an opinion had displayed jurisdictional error and procedural unfairness.*
- 9. The Tribunal penalised the Applicant for factual errors presented to it by statements written by the Applicant's daughter in representations made to it prior to the hearing. In not discounting the daughter's statements and not accepting the Applicant's evidence under oath, the Tribunal showed its reluctance to accept the Applicant's evidence. This was procedurally wrong because the Tribunal should have relied on the Applicants evidence.*

Particulars

- i. The Tribunal ought to have realised that the written evidence was presented by the applicant's daughter and the daughter admitted she had made a number of mistakes.*
 - ii. The applicant was penalised for the mistakes of the daughter who readily admitted being frustrated at the time of providing the evidence.*
 - iii. This admission was crucial to the Applicant but the Tribunal refused to take this into account.*
- 10. The Tribunal had been guilty of gross jurisdictional error and pre meditated bias that affected the applicant cause*

because when the Tribunal refused to accept that a relationship existed as husband and wife between the applicant and the nominator to the exclusion of all others, it disregarded any claims of domestic violence that the applicant had had.

- 11. The Tribunal erroneously made a decision that defied logic even when it was presented with facts that the couple were in fact married. No reasonable Tribunal could have made such a decision.*
- 12. The Tribunal wrongly applied the test of spouse as defined in subregulation 1.15A.*
- 13. The matter should be sent back to a newly constituted Tribunal so that a fair hearing can be given to the Applicant.*
- 14. The Tribunal exceeded its jurisdictional powers in trying to overstep its powers. The Tribunal should have determined that the Applicant and the nominator were in a genuine relationship and the definition of spouse as defined in subregulation 1.15A was satisfied. That was the only Issue that the Tribunal was supposed to determine. By overstepping its powers the Tribunal entered an arena that brought its bias, procedural unfairness and pre-mediated conclusions that were jurisdictionally wrong. This denied the Applicant any chance of getting a fair hearing. (copied without alteration or correction)*

Submissions

12. Some of the 23 grounds of review are particularised in detail, while others contain material more appropriately categorised as submissions. These submissions took the form of arguments and counter arguments in support of each ground. The application was signed by the applicant. However, it is clearly apparent that the application was prepared by someone with knowledge of judicial review of Tribunal decisions. The Court file indicates that Mr A Kumar of counsel appeared on behalf of the applicant at the first court date on a direct access basis.
13. In accordance with leave granted by Registrar McIlhatton, the applicant filed an amended application. This document is also signed by the applicant and again it is quite clear that it was prepared by

someone familiar with these review applications. The amended application reduced the number of grounds to 14. The structure of the amended application is very similar to that of the original application in that some grounds of review contain detailed particulars, while others contain submissions and yet others are bland statements. The original application and the amended application appear to have been prepared by the same unidentified third party.

14. A set of submissions, the details of which are referred to in the paragraph below, have also been filed in these proceedings. These submissions make no direct reference to the individual grounds raised in either the original application or the subsequent amended application. The self-represented applicant appearing before this Court had no real appreciation of the content of any of these documents. Neither did she have any comprehension of how they were to be used to compliment her application. The written submissions cover the matters raised in the original pleadings in a very general manner. With the assistance of written submissions from Ms Pepper for the respondents, the four broad claims raised in the applicant's written submissions were addressed. I intend to deal with those four broad categories of claims initially and then address any residual issues that arise from the amended application which have not been covered by the applicant's submissions.
15. The applicant filed a detailed outline of submissions on 16 October 2006. The five issues addressed are as follows:
 - a) Failure to take relevant considerations;
 - b) Unreasonableness and illogicality;
 - c) Burden of proof;
 - d) Wrong questions; and
 - e) Bias.
16. When the applicant was invited to make oral submissions in support of her application she sought to file four new letters of support saying that she had taken an active role in the community by providing support at St Oliver's Primary School as canteen assistant and by volunteering at

the Harris Park Community Centre. There was no objection to the filing of these documents and leave was granted. The letters were written by:

- a) Margaret Bamford, Canteen Manager, St Oliver's Primary School;
- b) Robyn Minici, Coordinator, Harris Park Community Centre Inc;
- c) Josephine Soo, Harris Park Newsagency; and
- d) Ann Desmond, Harris Park Community Centre Inc.

17. The applicant then repeated the circumstances leading to this application, in effect repeating the background information as set out above. The applicant provided details of her marriage, the subsequent deterioration of the relationship and an apprehended violence order ("AVO") against the nominator. The applicant then referred to her community involvement while she had been in Australia the four letters of support as detailed above.

18. The applicant's written submissions under the heading 'Failure to take relevant considerations' submits that the Tribunal failed to take into account certain relevant considerations. She claimed that the evidence of the nominator was not taken into account in determining whether the relationship existed. The nominator had provided evidence in the form of a statutory declaration attesting to the existence of their relationship and that they resided together at Harris Park, Sydney.(CB 40) On 7 November 1999, the applicant's daughter asked the nominator to leave that address because of alleged domestic violence.(CB 40.6) The applicant submits that the Tribunal erred in its decision by stating:

There is no independent documentary evidence corroborative of the visa applicant and the nominator living together at any address...(CB 110.4)

19. The applicant submits that although the nominator withdrew his statutory declaration, that document, whether expressly or implicitly, adverts to the applicant and the nominator living together.

20. The applicant also submits that the Tribunal misinterpreted the evidence regarding the AVO as that information confirms that the

nominator and applicant lived at Harris Park together. It is submitted that the Tribunal should have accepted that another Court when making the AVO was satisfied of the existence of the relationship on the balance of probabilities.

21. Ms Pepper, in her written submissions, submits that the Tribunal had regard to the evidence that on 7 November 1999, the applicant's daughter had told the nominator that he had to leave the house because of domestic violence.(CB 101, 104.4-105.5, 107.3, 108, 110)
The Tribunal concluded as a matter of fact that there was simply "no independent documentary evidence corroborative of the visa applicant and the nominator living together at any address either in Sydney or Taree".(CB 110.4) Ms Pepper submits that to review the finding made by the Tribunal in this regard would amount to the Court engaging in merits review, especially since there is no evidence that the Tribunal did anything other than exercise its power in a bona fide way: *Minister for Immigration v Wu Shan Liang* (1996) CLR 259 at 272.
The Tribunal weighed up the evidence of the applicant and made a finding of fact which was open to it on the material before it. It was entitled to do so in the circumstances: *Kopalapillai v Minister for Immigration* (1998) 86 FCR 547 at 558 - 559.
22. I accept Ms Pepper's submission that the first claim should be rejected as merits review is not available to this Court. Merits review is an assessment of the appropriateness of a decision as distinct from judicial review which focuses on lawfulness of a decision. Judicial review asks whether the decision-maker was authorised to do what he or she did under the prevailing law, not whether the actual decision was the best decision which could have been made in the circumstances. Merits review provides a complete review of all the issues relevant to the application. The reviewing body has the capacity to consider the relevant material previously considered as well as any new evidence that may become available. That reviewing body makes a decision about the merits of the application, unfettered by earlier decisions or reasons of the earlier decision-maker(s). Merits review determines the correct and preferable decision under the circumstances. That is not available to this Court and this ground of review cannot be sustained.

23. The applicant in her written submissions under the heading ‘Unreasonableness and illogicality’ makes her second claim that the Tribunal was illogical in making its decision by stating:

The Tribunal finds it significant that there are no supporting statements from family or friends of the nominator in support of the relationship at the time of application.(CB 111.8)

24. It is submitted that the Tribunal ought to have known that the nominator was a widower and it should be clear “that both the nominator and the applicant were looking for a relationship”.
25. Further, the applicant submits that the Tribunal decision is unreasonable and illogical in its treatment of the joint bank account of the nominator and the applicant. The Tribunal attempted to follow a checklist within the Regulations and failed to take into account the unique characteristics of the marriage. The applicant claims that at the time of the assessment, she did not have access to Centrelink benefits. Consequently, the only monies in the joint account were pension payments received by the nominator. The Tribunal also failed to take into consideration the applicant’s reliance on her daughter to both read and write on her behalf. The applicant’s daughter also operated the bank account in question. The Tribunal failed to consider whether the applicant was capable of operating the bank account, but instead followed the Regulations mandatorily. The applicant submits that the Tribunal failed to consider whether the nominator would have authorised the daughter to operate the bank account on behalf of the applicant.
26. Further and in relation to the second claim, the applicant said that the Tribunal erred in its assessment of what constituted mutual commitment in the relationship. It instead considered irrelevant considerations such as whether the applicant’s daughter’s evidence was reliable. This was even though both parties to the spousal relationship stated that a commitment existed between them. The applicant claims that both parties were married and had a genuine commitment, which was confirmed by the nominator.(Annexure “A”, affidavit of Ms Nanson)

27. Ms Pepper submits that there is nothing unreasonable or illogical about the Tribunal finding it “significant” that there were no supporting statements from family or friends of the nominator.(CB 111) Given that the nominator was resident in Australia, it was both logical and reasonable for the Tribunal to expect that had the relationship been genuine, those acquainted with the nominator would provide corroborative evidence of the relationship. Similarly, the Tribunal did not err in finding that it was “not satisfied that there was any joint pooling of financial resources or joint responsibility for debts that would be expected of a married couple.”(CB 109) The applicant had also conceded to the Tribunal at the hearing that she was not permitted access to the funds in the bank account; and that it was only opened because the Department had told them to open such an account when the visa application was lodged.(CB 109)
28. Ms Pepper submits that the remaining particulars of the second claim are an attempt to cavil with the factual findings of the Tribunal and they, along with this ground, must be rejected as not giving rise to jurisdictional error. I accept Ms Pepper’s submissions in that the applicant did not identify any law which she says the Tribunal misapplied. The Tribunal decision makes clear the law and test to which it had regard in the first part of its decision. There is no error by which the Tribunal distilled and applied those principles. The Tribunal’s findings and conclusions were open to it on the evidence and material before it. No error exists and this second claim cannot be sustained.
29. The applicant, in her written submissions in respect of her third claim, submits that the Tribunal imposed an onerous burden of proof on the applicant beyond that which is required under the Act. *Epeabaka v Minister for Immigration* [1997] 1413 FCA per Finkelstein J noted:
- A proceeding before the Tribunal is not adversarial for the reason that there is no party opposing an applicant...One consequence of a proceeding not being adversarial is that an applicant does not carry any burden of proof...Thus, the Tribunal must simply listen to all of the evidence and decide the case on the basis of that evidence...*
30. The applicant submits that the Tribunal did not give her the benefit of the doubt. The applicant submits that the Tribunal approach

was to the detriment of the applicant and that it wrongfully applied the law, which allows the decision to be set aside.

31. Ms Pepper submits that the Tribunal was not satisfied because the evidence presented by the applicant did not meet the criteria in subclause 820.211(2) of the Regulations. Notwithstanding the inquisitorial nature of the Tribunal hearing process, it is nevertheless for the applicant to advance whatever evidence he/she seeks to rely upon in support of his/her case: *Abebe v Commonwealth of Australia* (1999) 162 CLR 510 at [90], [187] and [190]. This is the statutory criteria which the Tribunal had to be satisfied in order to properly exercise its jurisdiction. The Tribunal did not err, let alone commit jurisdictional error, in finding that the applicant had failed to discharge her burden in this regard.
32. The applicant submits in respect of the fourth claim that the Tribunal asked itself a wrong question in order to determining the applicant's daughter's evidence. I note that the applicant's written submissions state that the error related to her sister; however a review of the Court Book and the Tribunal decision finds no reference to a sister of the applicant. I believe this to be an error and the written submissions should read "the applicant's daughter". The applicant submits that the Tribunal erred in stating the absence of evidence from family and friends without having regard to the limited family members that the applicant had in Australia.(CB 111.6) Moreover, there were members of the nominator's family who were unhappy with the marriage. In the circumstances, the Tribunal erred in "not finding this aspect not relevant". Further, the applicant submits that the Tribunal erred in asking inappropriate questions about an intercultural marriage.
33. Ms Pepper submits that there is nothing to suggest, either on the face of the Tribunal record or in the transcript of hearing, that the Tribunal asked itself a wrong question and therefore failed to exercise its jurisdiction or committed some other jurisdictional error. Ms Pepper submits that absent more cogent details from the applicant, the fourth claim should be rejected.
34. The second ground of the amended application raises issues also referred to in the fourth claim of the applicant's written submissions. Particular (iv) of the second ground refers to "the financial aspects of

the relationship”. The Tribunal decision also sets out the material provided by the applicant during its hearing.(CB 104.7) The applicant makes a significant concession in giving that evidence:

She stated that she and the nominator opened a joint bank account with St George and that the nominator's pension was placed into this account. She was not allowed to withdraw any money from this account. There were never any joint funds placed into this account. The account was opened because they were told by the Department that they needed to do this when they lodged the application.(CB 104.7)

35. The Tribunal then made the following statement:

The financial aspects of the relationship.

38. There is no evidence as to any joint ownership of assets or liabilities or any pooling of resources. The visa applicant stated at the hearing that she and the nominator had a joint bank account which is now closed. She conceded at hearing that she was not permitted access to any funds which were contained in that account and it was opened as they were told by the Department when lodging the application that a joint account should be opened. The evidence of the visa applicant at hearing was that the nominator did not provide the visa applicant with any financial assistance and the nominator was in receipt of a pension. The Tribunal is not satisfied that there was any joint pooling of financial resources or joint responsibility for debts that would be expected of a married couple.(CB 109)

36. I am satisfied that the Tribunal clearly dealt with this issue as set out in its findings. The points raised in the amended application do not alter the line of reasoning adopted by the Tribunal. The line of questioning suggested in the amended application does not indicate that the Tribunal misunderstood or failed to adequately enquire into this aspect of the applicant's relationship with the nominator.

37. In respect of the claim of bias, the applicant's written submissions state that the Tribunal also relied on the findings of the Tribunal previously constituted. It is submitted that the transcript of the first Tribunal held on 14 May 2002 indicates that the second Tribunal adopted earlier findings affected by bias. The submissions identify pages 11 and 12 of the transcript as being the relevant material. I will refer to this claim below. The applicant also submits that the notion of whether she

wanted to be close to her daughter, was irrelevant to the consideration of whether there was a relationship between the applicant and the nominator.

38. Ms Pepper, in her written submissions, submits that there is no cogent evidence in this case that the state of mind of the Tribunal member would constitute actual bias or apprehended bias: *NADH of 2001 v Minister for Immigration* (2004) 214 ALR 264 (“*NADH*”); *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507 (“*Jia*”) at [71]-[72]; *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337 at 344.
39. I refer to my general comments at [12] – [14] above, and in particular to the fourth claim as set out in the applicant’s written submissions on bias in the transcript of the first Tribunal hearing. I note that the transcript of that hearing is not in evidence in this Court. The only reference to the first Tribunal hearing held on 14 May 2002 appears at [26] of this Tribunal decision.(CB 103) In the absence of any specific pleading or particulars identifying that this Tribunal decision relied upon material drawn from the first Tribunal hearing, it is not possible to assess this claim. It is not apparent from the face of this Tribunal decision that it drew any conclusions from matters discussed during the first Tribunal hearing. I am not satisfied that the applicant’s fourth claim can be sustained.
40. The issue of bias was also raised by the applicant in her affidavit filed 27 September 2005. Her written submissions also makes the following statements:
 13. *Moreover, the applicant says that the Tribunal has misinterpreted the evidence regarding the apprehended violence order. The applicant submits that this evidence of the nominator residing in Sydney has been not been taken into consideration.*
 14. *In determining the nature of the household the applicant submits that the Tribunal’s in making its decision has failed to consider the effect of the nominator residing in Sydney.*
(copied without alteration or correction)
41. Again, these are all statements without particularisation. In the amended application, the issue of bias is raised in grounds 4, 5, 6, 7, 8, 10 and 14. Although these pleadings do not state whether the claim is

in fact an apprehension of bias or actual bias, the context suggests that the applicant is claiming both.

42. Actual bias can be said to exist when a decision-maker had a pre-existing state of mind which disabled him from undertaking or rendered him unwilling to undertake a proper evaluation of the relevant materials before him, which were relevant to the decision to be made: *Jia* at [35] and [72]. Actual bias may be said to exist when a decision-maker is so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented: *Jia* at [71] and [72].
43. A party alleging actual bias on the part of a decision-maker carries a heavy onus and it must be clearly proved: *Jia* at 531. The existence of actual bias may be inferred from facts and circumstances but caution should be exercised, in the absence of evidence of partisanship or hostility, before inferring actual bias from factual errors or faulty reasoning: *Tin Shwe v Minister for Immigration* [2000] FCA 988 at [27]; *Yit v Minister for Immigration* [2000] FCA 885 at [36].
44. Further, a case of actual bias is seldom made out by reference solely to the reasons for decision and no inference of bias or prejudgment can be drawn from the mere fact of adverse findings in a tribunal's reasons: *VFAB v Minister for Immigration* (2003) 131 FCR 102 at [21]; *SCAA v Minister for Immigration* [2002] FCA 668 at [38]; *WABC of 2002 v Minister for Immigration* [2002] FCAFC 286 at [3].
45. Apprehended bias will exist when a fair-minded lay observer, who is properly informed as to the nature of the proceedings, the matters in issue and the conduct of the Tribunal, would not apprehend that the tribunal member might not bring an impartial mind to the resolution of the question to be decided: *Refugee Review Tribunal, Re; Ex parte H* (2001) 75 ALJR 982 ("Ex parte H") at [27]; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293 - 294. Examples of such apprehended bias are:
 - a) The applicant was overborne or intimidated by the Tribunal: *Ex parte H* at [31].

- b) Fact finding of the Tribunal was conducted in a manner which was:
 - i) substantially unreasoned;
 - ii) in the nature of mere assertion that lacked rational or reasoned foundation;
 - iii) at times plainly and *ex facie* wrong; and
 - iv) selective of material going one way: *NADH* at [115].

46. A determination as to whether an administrative decision is affected by apprehended bias should be informed by the following considerations:

- a) Natural justice does not require the decision-maker's mind to be absent of any predisposition or inclination for, or against, an argument or conclusion. All that is required is for the decision-maker to be open to persuasion: *Jia* at [72] and [86].
- b) Apprehended bias in the context of an administrative decision-maker is not attended with the strictures that apply in the case of judicial prejudgment: *Jia* at [179]-[187], [244]-[245]; *NADH* at [19]. In *NADH*, Allsop J (Moore and Tamberlin JJ agreeing) described this difference:

“The tribunal does not administer public justice. The elements which affect the public confidence in the adjudication of disputes by an independent and impartial arm of government (in the broad sense) and which may be seen to inform what might be said to be freestanding norms of conduct and behaviour by judges conducting public hearings are not necessarily as easily transposable as strict obligations of administrative decision-makers acting in private. The tribunal here must investigate the facts for itself unaided by counsel presenting the parties’ cases, to the degree and extent it thinks appropriate. The tribunal which has to reach a state of satisfaction may want to test and probe a recounted history. It may have particular matters troubling it for resolution, which require questioning and expressions of doubt which are entirely appropriate, but which if undertaken or said by a judge in open court in adversary litigation might give rise to an apprehension of a lack of impartiality.”

47. Where credibility is in issue, the Tribunal member will necessarily have to test the evidence presented – often vigorously: *Ex parte H* at [30]. Procedural fairness will often require that the applicant be plainly confronted with matters which bear adversely on his/her credit or which brings his/her account into question. Further, the decision-maker's assessment of the applicant's credit will often depend upon their demeanour and the manner in which they give evidence: *Ex parte H* at [34].
48. Bias does not necessarily arise from illogical, irrational decision-making or inferences: *Re Minister for Immigration; Ex parte Applicant S20/2002* [2003] HCA 30 at [52], [75], [99] - [101]. Further, a manifestly defective or illogical approach to the consideration of evidence or irrationality in the reasons may create an impression of confusion, lack of care or incompetence. However, such an approach, without more, does not necessarily demonstrate apprehended bias: *Re Minister for Immigration; Ex parte Applicant S20/2002* at [101] and [136].
49. I am not satisfied that any of the claims or grounds alleging bias can be sustained and that all these claims should be dismissed.
50. Grounds one, two and three of the amended application suggest that the applicant and the nominator were in a genuine marital relationship until the applicant was forced to take out an AVO against the nominator. In order to protect her mother, the applicant's daughter was forced to demand that the nominator leave the where the applicant and the nominator were living. A range of evidentiary material has been submitted in support of the claim that a marital relationship existed. (CB 99-108) The Tribunal has set out each of these pieces of evidence in its decision and subsequently dealt with them in its reasons, indicating that it did not accept that a genuine marital relationship existed.(CB 113) I note that although the original application in this Court and the subsequent amended application appear to have been prepared with the assistance of a person familiar with applications for judicial review of migration decisions, no reference was made to the special provisions relating to domestic violence, which would appear to be directly relevant to the matter which is the subject of these proceedings: Division 1.5 of the Regulations.

51. Grounds 11, 12 and 13 of the amended application make no reference to issues of judicial review of the Tribunal decision and I do not believe it warrants further attention.
52. Ground nine of the amended application raises the issue of the applicant's daughter's statutory declaration and statements. These pleadings suggest – and on the daughter's own admission – a number of mistakes in these documents. The Tribunal acknowledged the errors and identified those in the decision:

The Tribunal gives the visa applicant's sister statutory declaration little weight.(CB 111.3)

53. The Tribunal then continued with its consideration of various pieces of information leading to its decision. However, this was not based on acknowledged errors in the applicant daughter's statutory declaration and statements. I am not satisfied that this ground of review can be sustained.

Conclusion

54. I acknowledge that the applicant is a self-represented litigant who is reliant upon an interpreter in these proceedings. Throughout the time that the applicant has been in this country, she has predominantly relied upon her daughter to interpret and write all her correspondence. The documents filed in these proceedings have been prepared by an unidentified third party who has some knowledge and understanding of judicial review of Tribunal decisions. However, the applicant had no knowledge or comprehension of the contents of the documents filed, and was unable to pursue her application.
55. Ms Pepper, counsel for the respondents, assisted the Court with written and oral submissions addressing the issues raised by the applicant in her written submissions to the Court. To fulfil the Court's obligation, I have considered the Tribunal decision and the Court Book. On the face of the documents before me, I have been unable to identify any jurisdictional error. Consequently, the application should be dismissed.

56. I am satisfied an order for costs should be made in this matter. I order the applicant pay the first respondent's costs and disbursements of and incidental to this application.

I certify that the preceding fifty-one (51) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM.

Associate:

Date: 11 December 2006